

Alert | American Indian Law



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Consulting With Native American Tribes on Energy and Infrastructure Development: Strategies for Reducing Project Risk

Tribal Consultation 101

“Tribal consultation” refers to the federal government’s legal obligation to consult with Native American tribes on energy and infrastructure projects, such as highways and railroads, pipelines, telecommunications towers and systems, and electrical transmission lines. Whenever a given project requires some sort of federal approval – a water-crossing permit from the U.S. Army Corps of Engineers, for instance, or a certificate from the Federal Energy Regulatory Commission to build a new natural gas pipeline – the tribal consultation requirement kicks in.

The project need not be on tribal land for the tribal consultation requirement to apply. On the contrary, the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), along with many other federal laws, mandate that the lead agency on each project must consult with all affected Indian tribes, on a government-to-government basis. This is true whether the project is on public or private land. The rule of thumb is that if a project needs federal permission to proceed, the federal agency considering it must identify the tribes in the project area and consult with them in a meaningful fashion before making any final decisions.

Energy and mining companies, utilities, highway authorities, telecommunications providers, and other project proponents are frequently caught off-guard by the tribal consultation requirement, particularly in parts of the United States located hundreds of miles away from the nearest Indian reservation. Of the 573 Native American and Alaska Native tribes officially recognized by the federal government today, about 325 retain a land base of some kind, often in federal trust status, meaning the land cannot be sold or transferred to others without Congressional approval.

Yet for the project proponent, locating these Indian reservation boundaries is only a first step. The proponent must also be aware of each tribe's original homelands, or what is sometimes referred to as a tribe's "aboriginal territory." Both NEPA and NHPA respect that tribal governments, which have existed since time immemorial and predate the founding of the United States, may retain ongoing cultural and spiritual connections to their original homelands, which in turn may be far removed from their current reservation lands. The federal agency charged with reviewing a given project faces the challenge of determining which tribes may be affected by the project, and providing an opportunity for those tribes to engage in meaningful consultation with the federal government when the project affects them.

When is Consultation 'Meaningful'?

A federal agency's consultation with a given tribe must be "meaningful" in order to be legally effective. During the Obama administration, federal agencies developed individualized tribal consultation requirements to try to define what interaction with tribes is meaningful and what is not. "History has shown," President Obama observed, "that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic consequences." These written tribal consultation policies, which have largely continued during the Trump administration, have been increasingly tested in the courts.

Most recently, in August 2019, the U.S. Court of Appeals for the District of Columbia rebuked the Federal Communications Commission (FCC) for adopting streamlined tribal consultation rules intended to accelerate the industry's rollout of 5G wireless telecommunications service. The FCC had contended that deploying smaller-scale cell towers and related facilities, which provide short-distance coverage needed to support 5G trunk networks, did not trigger the tribal consultation requirement under NEPA or NHPA. A unanimous three-judge panel in *United Keetoowah Band of Cherokee Indians v. FCC* disagreed: "The Commission failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural or environmental risk, particularly given the vast number of proposed deployments and the reality that the order will principally affect small cells that require new construction." The court emphasized that such consultation necessarily extends off-reservation to lands that tribes "regard as sacred or otherwise culturally significant," including not just individual tower sites but land vistas.

The D.C. Circuit's decision followed a decision by the U.S. District Court in Wyoming in 2015 to stop, on a nationwide basis, the Bureau of Land Management (BLM) from enforcing its final rule related to hydraulic fracturing or "fracking" on federal and Indian lands. The court in that case, *Wyoming v. Jewell*, granted a preliminary injunction against BLM sought by four states (Wyoming, Colorado, North Dakota and Utah) and the Ute Indian Tribe of the Uintah and Ouray Reservation in Northeastern Utah. The BLM insisted it had engaged in extensive tribal consultation when promulgating the fracking rule by holding four regional tribal consultation meetings, by offering to meet individually with tribal representatives individually after those meetings, and by distributing copies of the draft rule for comment in January 2012. After the rule was published, in June 2012 and again in May 2013, the BLM held additional tribal meetings and conducted other outreach.

None of these steps was sufficient to make BLM's consultation with the Ute Indian Tribe meaningful, according to the judge, Scott W. Skavdahl. "The BLM's efforts," the court concluded, "reflect little more than that offered to the public in general. The [Department of the Interior] policies and procedures require extra, meaningful efforts to involve tribes in the decision-making process." Judge Skavdahl noted that BLM spent more than a year developing the fracking rule before initiating any consultation with Indian tribes. The two changes the agency did make to its 96-page draft rule were minimal and did not address tribes' expressed concerns. The court characterized BLM's meetings as "more intended as informational and outreach sessions," as opposed to consultations where tribal representatives' expressed concerns were addressed.

These and other cases show that the standard for what constitutes meaningful consultation is still a work in progress. What is clear is that agencies must proactively engage tribes prior to making final decisions, take tribal perspectives seriously into account, and otherwise make "extra, meaningful efforts," as the court described it in *Jewell*, to involve tribes in the decision-making process.

Reducing Risk by Supporting the Tribal Consultation Process

Tribal consultation is a legal term, which means that only the federal government consults with Native American and Alaska Native tribes and nations. Yet project proponents can and should support the official consultation process to maximize opportunities for mutual collaboration and to mitigate potential project risk. Practical steps a project proponent may consider include:

1. **Confer with tribes before project locations and routes are finalized.** Proponents should reach out to individual tribes as early as possible in the planning process, using non-disclosure and other agreements. Many federal agencies maintain increasingly accurate, albeit incomplete, lists or registries of tribes with cultural affiliation to specific geographical areas across the United States. Archaeological, environmental engineering, and other consulting firms can also be helpful in identifying which tribes should be approached.
2. **Develop legal strategy with experienced counsel at the outset of any project.** When approaching tribes prior to or at the outset of a given project, it typically helps to retain legal counsel who are experienced in tribal governments, tribal law, and Federal Indian law. Because tribes are self-governing, they are often accustomed to doing business with and through attorneys, just as federal and state governments do. Instead of waiting to hire lawyers after legal problems arise, proponents should reach out to legal counsel at the inception of a project and use attorneys as trouble-shooters within the land, environmental, and engineering teams responsible for the project. As the tribal consultation unfolds, attorneys can be invaluable in helping federal agencies create a comprehensive administrative record attesting that the tribal consultation process is conducted in a meaningful fashion.
3. **Provide resources to tribes that are consulting with the federal government on the project.** Tribal governments are sometimes underfunded and understaffed, which means their ability to participate in tribal consultation may be limited by other competing considerations. It is not unusual for project proponents to provide reasonable and carefully tailored financial resources to tribes, when requested by tribes to do so. For instance, a proponent might arrange for tribes to commission their own ethnographic studies of the project area. Assisting tribes to obtain more accurate and complete information about a project makes for a more informed government-to-government consultation. Tribes may also request that proponents support tribal monitors throughout the cultural resource survey process, as well as during project construction and mitigation.

4. **Explore creative project mitigation.** It is not unusual for tribes voluntarily to enter into confidential mitigation agreements with project proponents, particularly under Section 106 of the National Historic Preservation Act, when cultural resources may be adversely affected. Greenberg Traurig recently negotiated such an agreement for an off-reservation wind energy project in which cultural artifacts uncovered during earth-disturbing activities will be curated by the tribe, at approved federal standards for such curation, with the permission of the state's Historic Preservation Officer. Such mitigation agreements can provide flexibility for tribes and companies alike, all within the existing federal statutory framework. Other examples of project mitigation include educational, scholarship and Native language and cultural preservation programs. The point is to think creatively and listen closely to tribes and their concerns.

Author

This GT Alert was prepared by **Troy A. Eid**. Questions about this information can be directed to:

- **Troy A. Eid** | +1 303.572.6521 | eidt@gtlaw.com
- Or your **Greenberg Traurig attorney**

* Troy A. Eid co-chairs the **American Indian Law Practice** of Greenberg Traurig, LLP and was part of the legal team that successfully challenged the FCC's 5G Wireless Rules for lack of meaningful tribal consultation in the *United Keetoowah Band* case.

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